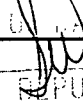


COURT OF APPEALS
DIVISION II

No. 41791-0

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STATE OF WASHINGTON
BY  DEPUTY

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

vs.

EUGENE TREMBLE III

APPELLANT.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR THURSTON COUNTY

Cause No. 10-1-02484-2

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is an appeal from a conviction by way of a jury trial. The jury found the defendant Eugene Tremble guilty of Assault in the 1st degree. Mr. Tremble was sentenced to 160 months, and a 24-month deadly weapon enhancement to be served consecutively.

Prior to the trial defendant Tremble expressed concern to the court as to the effectiveness of his attorney. After the trial, defendant Tremble again expressed concern regarding his attorney's performance at trial. Defendant Tremble filed pro se motions regarding his concerns at trial, including the jury instructions given, the sufficiency of evidence, and the video evidence available on the internet.

II. ASSIGNMENTS OF ERROR

- a. Was Defense Counsel Ineffective at Trial:
 - i. Was it Ineffective assistance of Counsel to fail to inquiry with the jury as to whether they had seen the video of the alleged incident on the Internet?
 - ii. Was Defense Counsel Ineffective by failing to withdraw when it became evident that he

previously had represented an alleged victim of
Defendant Tremble?

- b. Was sufficient evidence presented to convict the
defendant, when the witness testified in direct conflict
with the State's Theory of the Case?
- c. Should the Court have given the proposed jury
instruction?

III. STATEMENT OF CASE

The allegation stemmed from an incident that occurred on May 14, 2010 in Tacoma, Pierce County Washington. It was alleged that at the Latitude 84 Tavern, that a black male (later alleged to be the defendant) struck a woman in the face with a glass causing serious injuries to her face. Video of the incident was made, and this video found its way onto the Internet, eventually being available for viewing on the website YouTube.¹ Later an anonymous male contacted the authorities and indicated that Trey Tremble was the individual in the video. Police investigations indicated that Eugene Tremble III also used the name Trey Tremble.

¹ <http://www.youtube.com/watch?v=OB5lEXpY3Ak>

On June 8, 2010, Defendant Eugene Tremble III was charged with Assault in the First Degree in Pierce county Superior Court. Defendant Tremble was charged under RCW 9A.36.011(1)(c) assaults another and inflicts great bodily harm.

On December 2, 2010 the defendant by letter informed the court that he had concerns regarding his attorney. The case proceeded to trial on December 7, 2010. On December 9, 2010 the defendant was found guilty by the jury. On Special Verdict Form 1, the jury found that the defendant was armed with a deadly weapon in the commission of the crime. A sentencing occurred on February 4, 2011. On February 4, 2011 the defendant by motion moved for a new trial, as well as asking for relief from the judgment.

At his sentencing Defendant Tremble's range was 138-184 months with a deadly weapon enhancement of 24 months. On February 4, 2011, the defendant was sentenced to 160 months plus 24 months for the deadly weapon enhancement to run consecutively.

IV. ARUGMENT

The defendant asserts that defense counsel was ineffective at trial for failing to assure that potential jurors had not previously viewed the video of the incident on the internet, and failed to acknowledge that he might have a conflict. The defendant asserts that insufficient evidence existed to convict the defendant, and vehemently opposed the jury instruction to convict on the assault one charge.

A. DEFENSE COUNSEL WAS INEFFECTIVE AT TRIAL AND THIS PREJUDICED THE DEFENDANT.

Under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 688, 684-686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wash.2d 61, 7, 917 P.2d 563 (1996). To successfully challenge the effective assistance of counsel, Petitioner must satisfy a two-part test. Petitioner must show (1) defense counsel's representation was deficient, it fell below an objective standard of reasonableness based upon on consideration of all the circumstances; and (2) defense counsel's deficient

representation prejudiced the defendant, there is a reasonable probability that except for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

The court will not find ineffective assistance of counsel if the actions of counsel complained of go to the theory of the case or trial tactics. *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982).

Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Not all strategies or tactics on the part of the defense counsel are immune from attack. The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L.ED 2d 985 (2000).

Ineffective assistance of counsel is a mixed question of law and fact. Because claims of ineffective assistance of counsel present mixed questions of law and fact, the cases are reviewed de novo. *In Re Pers. Restraint Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

The defendant asserts that his attorney was ineffective in three ways. First, his counsel failed to assure that the jury was not previously exposed to the video of the incident available for viewing on the internet. Second, his attorney did not meet with, discuss the case, review the discovery, follow up on investigation, or present evidence at trial. Finally, defense counsel failed to acknowledge that he had previously represented a previous victim of Defendant Tremble, and discussion of these previous victims would be brought up at sentencing.

i. It was ineffective assistance of counsel to fail to inquire with the jury as to whether they had seen the video of the alleged incident on the Internet.

There is no question that the video was readily available on Youtube. Anyone with an internet connection could download and view the scene of the incident. In today's world of smartphones, laptops, netbooks, ipads, and tablets, most jury members can access the internet without even having to leave the courthouse. Pierce County City Building provides free wifi service to individuals inside the courthouse. Despite the ready access to this internet, and in this case video of the alleged incident, the issue of the jury

accessing the internet to view this material was not discussed until the case was almost over. CP, P. 205, 20-25.

This issue was brought up by the State "Now that they've heard this video is on Youtube, this might actually be an appropriate time to tell them, "Don't go on YouTube." CP, P. 205, I. 25, P. 206, I. 2-3. In response to the State's concern, the court answered: "Well, other than the comments that are posted probably on Youtube, they have already seen the video so there's no real harm, but I will remind them once again not to do any kind of Internet research." CP, P. 206 I. 3-6. Although the video is available on YouTube, it was also available on the Komo News website, accompanied by comments from viewers.

The court then warned the jury not to do any internet research during their deliberation. Tremble CP, P. 207, I. 1-4.

Despite the concern expressed by the State, and the Court, the defense was oddly silent during this discussion. Even more concerning, is this appears to be the first time that the issue of the jury accessing YouTube and the video of the incident was addressed. The parties failed to inquire prior to the viewing the video, as to if anyone had actually viewed the video available on the internet.

An objective standard of reasonableness requires that the defense attorney assure that the juror has not been negatively exposed to the case. Especially, actual video of the incident. The court acknowledged that there is also the issue of jurors being exposed to inflammatory comments posted in response to the videos. Because there was no inquiry, we do not know how prejudicial this may have been.

ii. Defense counsel was ineffective by failing to recognize that he had a potential conflict on the case, and not withdrawing himself from representation.

On December 2, 2010, the defendant contacted the court and notified the court that Charity Davis was the mother of his children. Ms. Davis previously had been a victim in one of Defendant Tremble's cases. Dana Ryan, the defense attorney for Mr. Tremble, had previously also represented Ms. Davis.

The nature of not just the victim in this case, but previous victims was brought up at sentencing, and was one of the justifications the State used in supporting their sentencing request. At sentencing the State argued "But he's victimized a number of women in the past they've basically been the mothers of his various

children, and when it came time to try to get that case into court and actually make a case on it, we could not get cooperation, we could never make a case. CP, P. 265, I. 3-7.

Dana Ryan did acknowledge that he previously had been appointed to represent Charity Davis, a previous victim of Defendant Tremble. "The victim's name is Charity Davis. She was a victim in a prior assault where Mr. Tremble was charged. Apparently I have been appointed on that case at one point by the Department of Assigned Counsel, and from I can tell, before I actually met with her and discussed any of the particulars, another attorney was appointed. CP, P. 7, I. 21-25, P. 8, I. 1-2.

The State indicated that it might attempt to use Ms. Davis as a rebuttal witness. The State argued "Again, I only see that as a potential rebuttal. I think it's fairly unlikely potential rebuttal." CP, P. 11, I. 14-15.

Mr. Ryan acknowledges that he had previously represented Ms. Davis. He indicates that the case was taken over before he had a chance to discuss the case with Ms. Davis. He does not indicate, what if any investigation or review of the facts he performed.

Again, any reasonable attorney would simply recuse themselves from the case when a conflict like this is revealed. However, this

case is not as simple as an attorney weighing a potential conflict. The defendant expressly asked the court to remove Mr. Ryan because of this potential conflict. This can not be considered a valid trial tactic to stay on a case where the defendant is objecting to the representation because of a potential conflict.

RPC 1.9 indicates: A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

In this case in addition to the analysis of whether there is a conflict, Mr. Ryan should have sought the input of Ms. Davis. The record is devoid of what if any activity Mr. Ryan took to resolve this potential conflict.

iii. The Defendant asserted that his Defense Attorney was ill prepared for trial, did not meet with him prior to trial, had not reviewed the discovery with him.

Defendant Tremble literally plead with the court asking for new counsel. By letter, filed with the Superior Court, he indicated the following deficiencies in his counsel's performance, prior to trial:

1. He has previously represented my children's' mother in a case. She has been victim (sic) in one of my previous cases (Charity Davis)
2. He has never returned any messages provided discovery as requested, interviewed witnesses, reported any investigation findings, or informed me of my defense.
3. He has seen me at 2 court hearings and twice in the jail with no follow through after these meetings regarding the case. Letter Filed by Eugene Tremble December 2, 2010.

If accurate these allegations provide a troubling issue for whether or not counsel provided effective assistance of trial. Failing to return messages, interview witnesses, or keep the defendant informed all fall below an objective standard for a reasonable attorney.

RPC 1.3 provides: A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf.

RPC 1.4 (3-4) state: keep the client reasonably informed about the status of the matter;... promptly comply with reasonable requests for information.

There was no inquiry at trial into Defendant Tremble's

allegations. However, at trial the defense put on no witnesses. CP, P. 205, I. 5-24. After the state rested, the defense rested without providing any evidence. CP, P. 206, I. 8-12.

Defendant Tremble alleged before the trial began that his attorney was failing to meet the objective reasonableness as required by Rules of Professional Conduct. Despite these pleas for help, no action was taken by the Court or Mr. Ryan. No action was taken to preserve Defendant Tremble's right to a fair trial.

Defendant Tremble's closing words to the court in his letter seem prophetic. "The fact of the matter is that the jury in my case WILL make a decision regardless; but I would like the decision to be informed, fair, and factual. Those findings cry out for even handed presentation on both sides of the courtroom. Mr. Ryan is not the one who can provide that for me."

There is not a tactical reason for failing to follow up with witnesses, or keep the defendant informed. On this issue the

defense, and the judicial system failed Defendant Tremble.

B. Insufficient evidence existed to convict the defendant and the court should set aside the conviction.

The defendant was charged with Assault in the First degree, as committed with a deadly weapon. RCW 9A.36.011 provides:

(1) A person is guilty of assault in the first degree if he or she, with intent to Inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or (c) Assaults another and inflicts great bodily harm. (2) Assault in the first degree is a class A felony.

The alleged victim in this case was Uywaijiamaya Smith. CP 178, I. 17. At the time of the incident the victim had consumed two cans of beer and three glasses of liquor. CP 180, I. 12-14. The victim also had used cocaine that night CP 180, I. 1-3. The victim had also smoked marijuana the night of the incident. CP 194, I. 13-14. The victim acknowledges that she is not visible on the video presented to the jury. CP 183, I. 6. The victim also stated she was

speaking in a smart-alec or with attitude at the time of the incident.

CP 186, I. 12-15.

When asked what happened the alleged victim indicated that she was hit in the face with a bottle. CP 186, I. 24-25. She again repeated that she was hit with a bottle. CP 187, I. 2-4. She testified that she was not looking at Mr. Tremble at the point in time she was hit. CP 187, I. 23-25. When asked what kind of bottle she was hit with she stated "I don't know. I just remember – I don't even – I don't know. CP 198 I. 1-3.

The jury instruction given indicated that "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." Instruction No. 6.

Jury Instruction No. 7, reinforces that intent must be shown: To Convict the defendant of the crime of assault in the first degree, each of the following for elements of the crime must be proven beyond a reasonable doubt... (2) That the defendant acted with intent to inflict great bodily harm;. Instruction No. 7.

Although the security video (the video available on YouTube) does show an altercation, it does not sufficiently show the assault. Viewing the video shows the alleged victim sitting behind some

lattice. As the defendant moves out on to the porch he is visible.

However, as he moves towards the victim, he is obscured.

Therefore the jury is left to base their decision off of the obscured video, and the testimony of the alleged victim. As discussed above the alleged victim was under the influence, of alcohol, cocaine, and marijuana at the time of the alleged incident. She did not see the defendant just before the alleged incident, and she disagrees with what happened, she alleges she was hit with a bottle as opposed to a glass.

Given the questionable testimony and obscured evidence, the only conclusion is that the jury became inflamed by the injuries of the victim, and overlooked the reasonable doubt present in this case.

C. The Inclusion of Jury Instruction 5(a) added to the Common Law Definitions to The Definition of Assault and Facts did not exist for each of these elements.

The term assault in RCW 9A.36.011(1)(a) constitutes an element of the crime of first degree assault. *State v. Smith*, 159 Wn. 2d 778, 788, 154 P.3d 873 (2007). Because assault is not

defined in the criminal code, courts have turned to the common law for its definitions. These definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. *Id.* 785.

The court included these definitions in its instruction 5(a):

An assault is an intentional touching or striking or cutting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.

An assault is also an act with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. Instruction 5(a).

There is no dispute that the victim did not know what she was hit with, describing it as a bottle. When asked what kind of bottle she was hit with she stated "I don't know. I just remember – I don't even – I don't know. CP 198 I. 1-3. She was not looking at

Defendant Tremble prior to the incident. She testified that she was not looking at Mr. Tremble at the point in time she was hit. CP 187, I. 23-25.

The definition of Assault under the WPIC consist of a general definition of assault by battery, a more specific definition of assault by attempted battery, and the definition of assault as defined by the common law where a defendant creates fear or apprehension.

In this case the Jury was given instruction 5 stating: A person commits the crime of assault in the first degree when, with intent to inflicts great bodily harm, her or she assaults another and inflicts great bodily harm.

By giving the instruction above the jury was required to find that there was an intent and infliction as elements. Jury Instruction 5(a) then followed providing definitions of assault, and absent specific instruction to limit the jury, the term assault in any one of the three definitions could have been substituted by the jury into the assault element in jury instruction 5.

Jury Instructions 5, 5(a), and 7 interplayed to result in an unfair and unjust trial. The jury was instructed to convict only upon a showing of proof beyond a reasonable doubt, that with intent

there was an actual infliction of an injury by Mr. Tremble. Next, they were provided instruction 5(a) some of the definitions require actual inflicted injury, or intent but not both. As a result the jury could rely upon the definitions of 5(a) to actually remove elements from the elements to convict.

V. CONCLUSION

The defense attorney was ineffective at trial and this ineffectiveness prejudiced the defendant at trial. The defense attorney failed to appreciate that he had previously represented a victim of the defendant, and failed to provide adequate information to evaluate whether or not he should have recused himself. The defense attorney failed to inquire as to whether anyone on the jury had viewed the alleged incident on YouTube, or take actions to prevent the jury from exploring the case on YouTube. Obviously, viewing video of the incident prior to hearing the evidence could severely prejudice a potential jury's perception. Even worse this was not addressed until almost the end of the trial. There is simply no way of identifying how detrimental to the jury trial this actually was. Finally, Defendant Tremble repeatedly brought his concerns

to the court about his attorney. No action was taken by the court or counsel to remedy these concerns.

Additionally, the State's theory of the case was not supported by the evidence presented by the alleged victim. The victim directly contradicted the State's Theory of the case. Finally, the court failed to give the appropriate jury instruction.

Any of these deficiencies would be sufficient to question whether or not the defendant was given a fair trial. However, taken together these issues assured that the defendant would not given a fair trial. Defendant Tremble respectfully requests the Court overturn his conviction, and grant him a new trial.

Respectfully submitted this September 13, 2011.



Kenneth W. Blanford
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CERTIFICATE OF SERVICE

I Kenneth W. Blanford, hereby certifies under penalty of perjury under the laws of the State of Washington that on the day set out below, I delivered true and correct copies of the opening brief of the appellant to respondent by ABC-Legal Messengers, Inc., to:

Pierce County Prosecutors
930 Tacoma Ave S # 946
Tacoma, WA 98402-2171

Signed at Tacoma, Washington this September 13, 2011.



Kenneth W. Blanford
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STATE OF WASHINGTON
BY DEPUTY

No. 41791-0

COURT OF APPEALS
DIVISION II

11 SEP 26 PM 1:20

STATE OF WASHINGTON

BY _____
DEPUTY

DIVISION II OF THE COURT OF APPEALS
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STATE OF WASHINGTON,

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vs.

EUGENE TREMBLE III

APPELLANT.

APPEAL FROM THE SUPERIOR COURT

AMENDED DECLARATION OF SERVICE

Cause No. 10-1-02484-2

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

I Kenneth W. Blanford, hereby certifies under penalty of perjury under the laws of the State of Washington that on the day set out below, I delivered true and correct copies of the opening brief of the respondent who is represented by this office to the mailing address provided below:

Eugene Tremble
1625 E 34th Street Tacoma
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Signed at Tacoma, Washington this September 21, 2011.



Kenneth W. Blanford
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